November 15, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Meeting, Restoring Internet Freedom, WC Docket No. 17-108

Dear Ms. Dortch:

On November 14, 2017, Jeffrey Eisenach and Roslyn Layton, both Visiting Fellows at the American Enterprise Institute, met with Commissioner Michael O'Rielly and Brooke Ericson, Chief of Staff and Media Advisor to Commissioner O'Reilly. We noted the importance of the Federal Communications Commission to ensure a national framework for broadband so that states do not devolve into fragmented regulatory fiefdoms. We emphasized the importance of the FCC to use its authority to preempt states that wish to circumvent Congress's intent to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation" (47 U.S.C. § 230(b)(1)).

The attached article describes the constitutional arguments about federalism in the context of Internet Freedom. Please note that these expert opinions should not be construed as the position of the American Enterprise Institute, a non-profit, non-partisan organization.

Respectfully submitted,

/s/ Jeffrey Eisenach

/s/ Roslyn Layton

AMERICAN ENTERPRISE INSTITUTE
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CC:
Hon. Michael O'Rielly
Brooke Ericson

The Federalist and Anti-Federalist arguments for internet freedom

By Roslyn Layton, American Enterprise Institute
November 15, 2017
http://www.aei.org/publication/the-federalist-and-anti-federalist-arguments-for-internet-freedom/comment-page-1/#comment-188791

The Federal Communications Commission (FCC) is on its way to restore internet freedom by overturning the controversial 2015 reclassification of internet access services as Ma Bell type-utilities under Title II of the Communications Act of 1934. However, a number of blue states have vowed to adopt Obama-era internet policies, ultimately frustrating the FCC's efforts to restore a deregulatory framework for the internet, including at least 30 wanting to reinstate harmful asymmetric broadband privacy rules. Some may say, what's the problem? Those states have the right to do just that. But while the notion of states' rights suggests local sovereignty, states' rights cannot be interpreted as authority to contravene the national government, particularly in the area of interstate commerce. This blog reviews articles from *The Federalist Papers* to understand the Constitutional arguments.

In Federalist No. 13, titled "Advantage of the Union in Respect to Economy in Government," Hamilton makes the practical and economic argument for a federal government:

The entire separation of the States into thirteen unconnected sovereignties is a project too extravagant and too replete with danger to have many advocates. . . . When the dimensions of a State attain to a certain magnitude, it requires the same energy of government and the same forms of administration which are requisite in one of much greater extent.

Hamilton would recognize that creating internet regulations for each of the 50 states and 16 territories is costly and redundant.

In its 1934 Communications Act, Congress empowered the FCC as a centralizing authority for "interstate and foreign commerce in communication by wire and radio." However, Congress did allow states the ability to regulate communications that both originated and terminated within the same state, but that notion is untenable with the internet because data comes and goes from every part of the world. Importantly the FCC can preempt state efforts through Section 153 of the Act, allowing it to overrule states that want to regulate "information services," notably the internet, for which Congress wanted to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."

Indeed the FCC sometimes has to remind the states of its preemptive authority. In a recent proceeding, "Ensuring Continuity of 911 Communications," Commissioner O'Rielly stated that he did not "understand the hesitancy to make clear that states cannot regulate interconnected VoIP by adopting their own backup power requirements. The Commission previously declared that 'this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [VoIP] and other IP-enabled services having the same capabilities.'"

Having just overthrown an authoritarian power, the framers of the Constitution were cognizant of the need to limit federal powers. The Bill of Rights was adopted to ensure individual freedoms. Similarly, Anti-Federalist No. 11, titled "Unrestricted Power Over Commerce Should Not Be Given The National Government," notes that while Congress has power over interstate commerce, it is not unrestricted.

Although the 2015 Open Internet Order was upheld over challenge by the DC Circuit and denied *en banc* rehearing, seven petitions for a writ of certiorari are pending at the Supreme Court. These petitions argue that the order is illegal on administrative law, separation of powers, and First Amendment grounds. Broadly, they maintain that the FCC's interpretations underlying the Title II reclassification should be overturned because the fundamental approach to broadband regulation is such a major question of economic and political significance that typical Chevron deference is inapplicable. If one or more of these petitions succeed, the states issuing their own internet rules would also be in violation. Therefore, it is entirely fitting that the FCC reversed the overreach of the previous administration, restored the framework that Congress intended, and preempted the state level efforts to violate this policy.